84-237

No. _____

Office - Supreme Court, U.S.
FILED
AUG 10 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS,

Appellants,

v.

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

---

JURISDICTIONAL STATEMENT

CHARLES H. WILSON
Counsel of Record
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Counsel for Appellants

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

In holding unconstitutional a program of remedial educational services provided by the New York City Board of Education to private school children under the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.* (1982), did the court below err in ruling that this Court's Establishment Clause decisions create a *per se* rule prohibiting the assignment of public school teachers to provide instruction of any kind on the premises of church schools? *

---

* The other parties to this action are the Secretary of the United States Department of Education and the Chancellor of the Board of Education of the City of New York, both of whom were defendants in the district court and appellees in the court of appeals.

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	4
STATUTE INVOLVED	4
STATEMENT OF THE CASE	4
A. The Proceedings Below	4
B. The Challenged Program	5
C. The Court of Appeals' Decision	12
REASONS FOR PLENARY CONSIDERATION	14
CONCLUSION	20
APPENDIX	1a

TABLE OF AUTHORITIES

Cases: Page

Barnes v. *Bell*, C.A. No. C-80-0501-L-(B) (W.D. Ky., filed October 2, 1980) 3, 18-19
Committee for Public Education v. *Regan*, 444 U.S. 646 (1980) 15
Flast v. *Cohen*, 392 U.S. 83 (1968) 3, 18
Lynch v. *Donnelly*, 104 S. Ct. 1355 (1984) 12, 15-16
Marsh v. *Chambers*, 103 S. Ct. 3330 (1983) 16
Meek v. *Pittenger*, 421 U.S. 349 (1975) 12-14, 16
Mueller v. *Allen*, 103 S. Ct. 3062 (1983) 15
National Coalition for Public Education and Religious Liberty v. *Harris*, 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed*, 449 U.S. 808 (1980) 4-5, 13-14
Public Funds for Public Schools v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd summarily*, 417 U.S. 961 (1974) 12, 14
Roberts v. *United States Jaycees*, 52 U.S.L.W. 5076 (U.S., July 3, 1984) 18
School District of the City of Grand Rapids v. *Ball*, No. 83-990, October Term, 1983 (cert. granted, Feb. 27, 1984) 20
Stark v. *Bell*, No. 4-78 Civil 222 (D. Minn., voluntarily dismissed on April 13, 1984) 3, 18
Tilton v. *Richardson*, 403 U.S. 672 (1971) 17-18
Wamble v. *Bell*, C.A. No. 77-0254-CV-W-8 (W.D., Mo., argued and submitted March 30, 1983) 3, 18-19
Wheeler v. *Barrera*, 417 U.S. 402 (1974) 12-13, 17
Wolman v. *Walter*, 433 U.S. 229 (1977) 12, 14-15

Statutes:

Chapter I of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.* (1982) 1-2, 4, 6
Education Amendments of 1974, P.L. 93-380, 88 Stat. 484 (1974) 19
Education Amendments of 1978, P.L. 95-561, 92 Stat. 2143 (1978) 19
Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 2701 *et seq.* (1982) 1, 4

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 1252	3-4
28 U.S.C. § 2103	4
28 U.S.C. § 2282	3
United States Constitution:	
First Amendment	4
Articles:	
P. Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools*, 1 Land & Water L. Rev. 475 (1966)	19
Miscellaneous:	
S. Rep. No. 146, 89th Cong., 1st Sess. 5, *reprinted in* [1965] U.S. Code Cong. & Ad. News 1446	6-7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. ———

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS,

Appellants,

v.

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

---

JURISDICTIONAL STATEMENT

Appellants Yolanda Aguilar, Lillian Colon, Miriam Martinez and Belinda Williams, appeal from a judgment of the United States Court of Appeals for the Second Circuit holding unconstitutional under the Establishment Clause the New York City Board of Education's program for providing remedial educational services to children in private, church-affiliated schools under Chapter I of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.* (1982).[1]

---

[1] Appellees' complaint attacked the constitutionality of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 2701 *et seq.* (1982). On October 1, 1982, Title I was superseded

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not yet reported and is printed in the Appendix to the Jurisdictional Statement of the Solicitor General of the United States.[2] The decision of the United States District Court for the Eastern District of New York, which was reversed by the Court of Appeals, is also not reported and is printed in the Appendix to the Jurisdictional Statement of the Solicitor General.

JURISDICTION

On April 11, 1978, appellees filed a complaint in the United States District Court for the Eastern District of New York alleging that the method adopted by the New York City Board of Education for providing federally funded Title I remedial educational services to children in private, church-affiliated schools violated the Establishment Clause of the First Amendment. On October 20, 1983, the district court entered an order rejecting appellees' constitutional challenge and holding the challenged program constitutional. On July 9, 1984, the United States Court of Appeals for the Second Circuit reversed

---

by Chapter I of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.*, and it is the latter statute that is directly affected by the judgment from which this appeal is taken. However, Chapter I incorporates by reference many sections of former Title I, and includes identical provisions governing participation of private school students. (S.G. App. 3a n.1). Because the evidence that constitutes the record in this case was developed prior to the enactment of Chapter I and because the references in that evidence and in the opinions of the district court and the court of appeals identify the program as "Title I," that designation of the program will be used throughout this Jurisdictional Statement.

[2] The Solicitor General has filed a separate appeal from the decision by the court of appeals. *Secretary, United States Department of Education* v. *Felton*, No. 84-238, October Term, 1984. In the interests of economy, these appellants will not reproduce those materials printed in the Solicitor General's Appendix, but rather will cite it as "S.G. App."

the district court and ruled that the New York City program of federally funded Title I remedial educational services for private school students violated the Establishment Clause. This Court's jurisdiction is invoked under 28 U.S.C. § 1252.[3]

---

[3] While the precise focus of the appellees' constitutional attack was not on the facial validity of a federal statute but was on the method adopted by New York City to provide Title I services to students in church-affiliated schools, the prayer in their complaint sought relief far beyond the New York City program. Specifically, appellees requested that defendants be enjoined "from approving or carrying out *any* program for the expenditure of federal funds to finance, in whole or in part, the performance of educational services in religious schools during school hours." Complaint, ¶ 20(1) (emphasis added). In an analogous context, this Court held that similar allegations concerning Title I were sufficient to justify the convening of a three-judge court under 28 U.S.C. § 2282. *Flast* v. *Cohen*, 392 U.S. 83, 89-90 (1968). Specifically, this Court stated:

> "If the District Court in this case were to rule for appellants on the merits of their constitutional attack on New York City's federally funded programs, that decision would cast sufficient doubt on similar programs elsewhere as to cause confusion approaching paralysis to surround the challenged statute." *Id.*

A report prepared by the former United States Office of Education and cited by the court below suggests that the practice of providing Title I remedial services on the premises of church-affiliated schools is common throughout the country. That report stated: "Title I creates the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school." (S.G. App. 14a). Moreover, there have been or are still pending other cases challenging the constitutionality of Title I services provided to students in church schools, and each case established that on-premises services is the norm. *Wamble* v. *Bell*, C.A. No. 77-0254-CV-W-8 (W.D. Mo., argued and submitted March 30, 1983); *Stark* v. *Bell*, No. 4-78 Civil 222 (D. Minn., voluntarily dismissed on April 13, 1984); *Barnes* v. *Bell*, C.A. No. C-80-0501-L(B) (W.D. Ky., filed October 2, 1980).

For these reasons, despite the appellees' focus in this case on the New York City Title I program for private school children, these

CONSTITUTIONAL PROVISION INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTE INVOLVED

This appeal draws into question the constitutionality, as applied, of Chapter I of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.* (1982), amending and superseding Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 2701 *et seq.* (1982). Pertinent sections of the statute are printed in the Appendix to the Jurisdictional Statement of the Solicitor General.

STATEMENT OF THE CASE

A. The Proceedings Below

Appellees, six federal taxpayers claiming standing as such, filed the complaint in this case in the United States District Court for the Eastern District of New York on April 11, 1978. At that time, a virtually identical Establishment Clause challenge to New York City's Title I program for private school students was pending in the United States District Court for the Southern District of New York. *National Coalition for Public Education and Religious Liberty* v. *Harris*, 489 F. Supp. 1248

---

appellants believe that the court of appeals held unconstitutional a common application of an Act of Congress and that this Court's appellate jurisdiction is, therefore, properly invoked under 28 U.S.C. § 1252. If the Court disagrees, these appellants request that the Court treat this Jurisdictional Statement as a Petition for a Writ of Certiorari. 28 U.S.C. § 2103.

(S.D.N.Y.), *appeal dismissed*, 449 U.S. 808 (1980) [hereinafter cited as "*PEARL*"]. As a result, the district court initially stayed this cas pending the disposition of *PEARL*.

After the three-judge district court in *PEARL* rejected the constitutional challenge to New York City's Title I program and this Court dismissed the appeal from that decision for want of jurisdiction, 449 U.S. 808 (1980), appellees renewed this constitutional challenge to Title I. These appellants, whose children attend church-affiliated schools and receive Title I remedial services at their schools, intervened to protect their children's interest in the continuation of the Title I program. The parties stipulated that the case should be decided on the evidentiary record developed in the *PEARL* case, supplemented by two affidavits providing current data on the size and scope of the Title I program in New York City and nationwide. The parties submitted cross-motions for summary judgment and, on October 20, 1983, the district court granted defendants' motions for summary judgment and dismissed the complaint. The district court placed substantial reliance on the analysis of the three-judge district court in the *PEARL* case.

On appeal, the United States Court of Appeals for the Second Circuit disagreed with the district court's conclusion and unanimously reversed, holding that providing Title I remedial instruction on the premises of church-affiliated schools constituted a *per se* violation of the Establishment Clause under this Court's earlier decisions. These appellants filed their Notice of Appeal with the court of appeals on August 2, 1984.

B. The Challenged Program

The Title I remedial educational program at issue in this appeal represents perhaps the most significant federal educational program ever undertaken, having been

funded in recent years in excess of $3 billion.[4] More than 5 million public school and almost 200,000 private school children benefit from the program.[5] The New York City Board of Education operates the largest single Title I program in the country. In a recent fiscal year, New York City's program was funded in excess of $147 million, representing 63 percent of New York State's total Title I allocation. Of those funds, some $20 million, or 13.5 percent of the total allocation, was expended in providing remedial services to private school students.[6]

During that same year, 302,382 public and private school students qualified for Title I remedial services. Of that total, 40,120, or 13.2 percent, attended private schools. Because budget limitations made it impossible to provide Title I services to all eligible public and private school students, slightly more than one-half of the eligible private school students received Title I instruction. Those students attended 231 of the 993 private schools in New York City.[7]

Title I was enacted in 1965 to "bring better education to millions of disadvantaged youth who need it most." S. Rep. No. 146, 89th Cong., 1st Sess. 5 (1965). The program was designed "to provide financial assistance to State and local educational agencies to meet the special needs of educationally deprived children." 20 U.S.C. § 3801. Congress determined that "there is a close relationship between conditions of poverty and lack of educational development and poor academic performance" and enacted Title I "as [a] very potent instrument to be

---

[4] See ¶ 20 of Defendants' Joint Statement of Material Facts Not in Dispute (hereinafter referred to as "Defendants' Joint Statement"). The court below relied upon that Statement in its recitation of the facts in this case. (S.G. App. 10a).

[5] Defendants' Joint Statement, ¶ 19.

[6] Defendants' Joint Statement, ¶ 28.

[7] Defendants' Joint Statement, ¶ 29.

used in the eradication of poverty and its effects." S. Rep. No. 146, *supra*, at p. 5. See 20 U.S.C. § 3801.

Congress appropriates funds annually to support programs proposed by local educational agencies ("LEAs") and approved by state educational agencies ("SEAs").[8] The LEA is solely responsible for administering and staffing the program for which it receives federal funds. To be eligible for Title I funds, an LEA's program must satisfy certain statutory criteria designed to assure that the statute's purposes are advanced. For example, only children who satisfy the dual eligibility criteria of educational and economic deprivation can qualify for Title I remedial instruction.[9] 20 U.S.C. §§ 2722, 2732-34. In addition, Title I funds are available only for programs that will supplement, and not supplant, non-federally funded programs that would have been available in the absence of Title I funds. 20 U.S.C. § 3807(b). Finally, the statute requires LEAs to extend Title I services on an equal and equitable basis to eligible children who attend private schools. 20 U.S.C. § 3806.

New York City experimented with two different methods of providing Title I services to private school children before adopting the on-premises program at issue in this case. The City tried to provide those services after regular school hours, first, at public schools and, later, at private schools. Attendance was poor in both programs for a number of reasons: both students and teachers were tired after a full school day and parents were concerned about the safety of their children traveling home after dark or in inclement weather. In addition, those pro-

---

[8] The remaining description of Title I and the New York City program at issue in this case is drawn from the court of appeals' opinion. See S.G. App. 10a-14a.

[9] A child is considered educationally disadvantaged if he is performing below grade level in certain subject areas. A child is considered economically disadvantaged if he lives in an area that has a high concentration of low-income families.

grams were ineffective because Title I teachers and regular classroom teachers could not communicate concerning the educational needs of the Title I students. Confronted by these problems, the New York City Board of Education decided in August 1966 that the only practical method of meeting its statutory obligation to provide Title I services to private school students was to provide those students with such services at their schools during the regular school day.[10] That method of providing Title I instruction has continued to the present time.[11]

Under the New York City program, eligible students in private schools[12] receive five types of Title I remedial services: remedial reading, remedial mathematics, reading skills centers, English as a second language, and clinical and guidance services. The clinical and guidance program is available only to students receiving a Title I instructional service. It is designed to enhance achievement in the four instructional programs through diagnosis and treatment provided by guidance counselors, social workers, psychologists and psychiatrists. The instructional programs stress individualized instruction, with students taught in groups of 10 or fewer. Students are treated on an individual basis in the clinical and guidance program.

---

[10] The Board believed that one other possible option—providing Title I instruction to private school students at public schools during regular school hours—was foreclosed by Art. XI, § 3 of the New York State Constitution. (S.G. App. 8a).

[11] The Board of Education has continued to examine the option of off-premises, after-hours Title I instruction for private school students. A study conducted in the 1977-1978 school year disclosed that a program that transported private school students to public schools for after-hours instruction would involve an expenditure of $4.2 million, or 42 percent of the total budget for private school Title I services, for such non-instructional costs as transportation. (S.G. App. 8a-9a).

[12] As the court of appeals noted, the vast majority of private school students receiving Title I services attend schools that are church-affiliated. (S.G. App. 7a).

Title I services are provided to private school students by regular salaried employees of the New York City Board of Education. The teachers and other professionals who provide those Title I services are selected from among public school employees who apply for such assignments. The selection of those teachers and other employees is made solely by administrators in the Bureau of Nonpublic School Reimbursable Services, which operates the private school Title I program. Religious affiliation plays no role in the assignment of a person to that program.

The amount of time that a particular public school teacher or other professional will spend at any one private school depends on the number of students eligible for Title I services at the school and the educational needs of such students. During the 1981-1982 school year,[13] approximately 78 percent of Title I teachers and all non-teacher professionals were itinerant in the sense that they spent fewer than five days a week in the same private school and worked in more than one. Affidavits of a considerable number of teachers disclosed that they worked in private schools with religious affiliations different from their own.

The Bureau of Nonpublic School Reimbursable Services provides regular and detailed guidance to teachers and other professionals in the private school Title I program. The teachers and other professionals are told they are solely accountable to their public school supervisors and have no accountability to private school administrators or teachers. They are also told that they are solely responsible for selecting students for the Title I program and that they must assure that materials and equipment given them for the Title I activities are used only in the Title I program. They are further told not

---

[13] At the time that the defendants submitted their motions for summary judgment and supporting evidence, the 1981-1982 school year was the most current year for which data was available.

to engage in team-teaching or other cooperative instructional activities with private school teachers, not to become involved in any religious activities in the private schools and not to introduce anything of a religious nature into their teaching. Any effective remedial program requires that the remedial teacher confer with a student's regular classroom teacher to determine the student's needs and classroom progress in the subject in which he is receiving remediation. While the Title I teachers are told such communications are permissible, they are instructed to confine such consultations to mutual professional concerns about their students' educational needs and not to engage in any discussion of matters of a religious nature. Appellees presented absolutely no evidence that any of these guidelines had been violated by Title I teachers throughout the many years Title I services have been provided on private school premises.

Title I teachers and other professionals in the private school Title I program are subject to the direct and sole supervision of public school field supervisors who make at least one unannounced visit each month to each Title I classroom in the private schools. The field supervisors are, in turn, supervised by public school program coordinators. The program coordinators aid in supervising Title I teachers and other professionals by occasional unannounced visits to Title I classrooms in private schools and by conducting regular in-service training sessions. Those sessions are used frequently to reinforce the guidelines concerning the proper scope of activities by Title I teachers and other professionals in the private schools.

Teaching materials and equipment used in the private school Title I program are selected by public school employees. The teaching materials cannot duplicate materials used in regular classroom instruction and can have no religious content. All such equipment and ma-

terials are labeled as public school property for use in the Title I program, are locked in storage and filing cabinets when not in use, are not to be used for any purpose but Title I instruction and are subject to an annual inventory.

Before Title I teachers or other professionals are assigned to a private school, administrators of the private school Title I program inform the principal of applicable federal, state and local guidelines, including the requirement that any room used for Title I instruction or support services be free of religious symbols. Private schools with students eligible for Title I services set aside a room for exclusive Title I use. The clinical and guidance professionals customarily use the nurse's room or a comparable facility. The record in this case contains no evidence that Title I services have been provided in any private school room containing a religious symbol.

Contacts between administrators of the private school Title I program and private school officials are routine in character and fall into three general categories—dissemination by Title I administrators of information about the program, submission by private school principals of requests for Title I services and responses by Title I administrators to routine inquiries by private school officials about details of the program. There is no evidence in the record to show or suggest that these administrative contacts have involved Title I administrators in the curricula or operations of private schools or have given private school officials any control at all over the Title I program.

The court of appeals considered the following quotation from a 1971 publication by the former United States Office of Education to be a fair description of the general operation of New York City's Title I program for private schools: "Title I creates the unusual situation in which an educational program may operate within the private school structure but be totally re-

moved from the administrative control and responsibility of the private school." (S.G. App. 14a).

C. The Court of Appeals' Decision

The court of appeals began its constitutional analysis by surveying the Establishment Clause decisions of this Court that it believed bore most directly on core issues facing it—the constitutionality of sending public school teachers on the premises of church-affiliated schools to provide instruction. After a general review of several of this Court's school aid decisions (S.G. App. 14a-22a), the court of appeals focused on four decisions that had dealt with that core issue—*Wheeler* v. *Barrera*, 417 U.S. 402 (1974); *Public Funds For Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd summarily*, 417 U.S. 961 (1974); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); and *Wolman* v. *Walter*, 433 U.S. 229 (1977). (S.G. App. 23a-36a). The court of appeals concluded that those four cases had, in effect, established a *per se* rule prohibiting public school teachers from offering instruction of any kind on the premises of church-affiliated schools. (S.G. App. 35a-36a).

These appellants and the other appellees below contended that more recent decisions of this Court establish that neither *Meek* and *Wolman* nor any of the Court's other Establishment Clause decisions intended to create *per se* rules.[14] While acknowledging that *Meek* invalidated a program with many of the features of Title I, appellees below noted that this Court's decision in that case rested on its perception of certain potentials and dangers that might flow from the auxiliary services program at issue there. Appellees below noted, however, that this Court refused in *Wheeler* to decide the consti-

---

[14] For example, in its most recent Establishment Clause decision, this Court admonished: "In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1361 (1984).

tutionality of an on-premises Title I program because it had no specific program before it. 417 U.S. at 426. Appellees below noted that the record in this case disclosed that none of the potentials or dangers that concerned the Court in *Meek* had materialized in the New York City private school Title I program during its long history of on-premises instruction. In light of this Court's suggestion in *Wheeler* that the parties to litigation such as this develop a record of a program's operation, appellees below contended that the uncontested facts concerning the operation of the New York City program were a sufficient basis for distinguishing *Meek*.[15] The court of appeals rejected those arguments for several reasons. (S.G. App. 37a-50a).

For example, the court of appeals contended that the uncontested evidence presented by the defendants in the district court addressed only the issue of whether religious influences had intruded into the Title I program and, therefore, addressed only the issue of whether the program had an invalid primary effect. (S.G. App. 37a-38a). In addition, it suggested that no volume of evidence offered by the defendants in the trial court could dispel the "possibility" that a Title I program conducted on the premises of church-affiliated schools might create constitutional problems.[16] (S.G. App. 38a-40a). Indeed,

---

[15] Indeed, it is on the basis of that very analysis that the three-judge district court in *PEARL* sustained the constitutionality of New York City's Title I program for private school students.

[16] The court of appeals noted that the defendants in the trial court had assumed the difficult burden of proving a negative. (S.G. App. 38a). It gave no consideration to the proper allocation of the burden of proof in constitutional or any other type of litigation—namely, the burden is on the plaintiff to prove the affirmative of the allegations made in the complaint. In this case, the plaintiffs offered no affirmative proof of any constitutional transgression in the administration of New York City's Title I program for private school students. Indeed, in the evidentiary hearing in *PEARL*, the plaintiffs conceded that the New York City program

while virtually ignoring the uncontested evidence in this case, the court of appeals indulged in unadorned speculation about potential constitutional problems in an on-premises program. (S.G. App. 40a-41a). Finally, the court of appeals expressed concern that, if the remedial instruction offered at church-affiliated schools under Title I survived constitutional scrutiny, government might be encouraged to offer a broad range of instructional programs at church-affiliated schools. (S.G. App. 41a-43a). It expressed that concern despite the fact that nothing in the record of this case or in the United States Code shows any significant expansion of federal educational programs since the enactment of the Elementary and Secondary Education Act in 1965.

REASONS FOR PLENARY CONSIDERATION

1. At the core of the court of appeals' ruling that the New York City private school Title I program breached the Establishment Clause was its conclusion that several of this Court's decisions have created a *per se* rule prohibiting public school teachers from offering any form of instruction at church-affiliated schools. It drew that conclusion principally from this Court's decisions in *Meek* v. *Pittenger*, *supra*, and *Wolman* v. *Walter*, *supra*, and the Court's summary affirmance of *Public Funds for Public Schools* v. *Marburger*, *supra*. The court of appeals also adopted a rather crabbed view of the strictures that the Establishment Clause imposes on educational programs that include among their beneficiaries students in church-affiliated schools. Both approaches by the court of appeals are out of harmony and in conflict with more recent Establishment Clause decisions of this Court that admonish against viewing prior cases in absolutist terms.

---

was constitutional. 489 F. Supp. at 1252. Thus, the failure of the defendants in the trial court to eliminate through their evidence every possibility of a constitutional transgression pales in significance in contrast to the plaintiffs' failure to adduce any evidence of any constitutional difficulty with the New York City program.

In its most recent Establishment Clause decision, this Court observed:

> "In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court." *Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1361 (1984).

The Court went on to assert rather pointedly: "In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Id.* Those observations echo the Court's earlier admonition in an educational aid case that "[w]hat is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes." *Committee for Public Education* v. *Regan*, 444 U.S. 646, 662 (1980).

This Court's recurring admonitions against absolutist approaches and *per se* rules are part of its broader effort in recent cases to assure itself that its decisions are in harmony with the historical reasons for the adoption of the Establishment Clause. For example, in *Mueller* v. *Allen*, 103 S. Ct. 3062, 3069 (1983), the Court quoted with approval from Justice Powell's separate opinion in *Wolman* v. *Walter*, *supra*, 433 U.S. at 263:

> "At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. . . . The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court."

More recently, in reviewing statements in some cases seeming to suggest the Establishment Clause mandates

total separation of church and state, the Court observed: "Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, *supra*, 104 S. Ct. at 1359. Such an approach to Establishment Clause issues simply acknowledges that "great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *Marsh* v. *Chambers*, 103 S. Ct. 3330, 3337 (1983).

Appellants submit that the court of appeals in this case abdicated its responsibility for proper constitutional adjudication by disregarding these recent teachings of this Court and resting its decision on an absolutist view of the Establishment Clause and a *per se* rule. In effect, it was unable to distinguish between real threat and mere shadow.

It is true that this Court invalidated in *Meek* v. *Pittenger*, *supra*, a program that had many of the features of Title I. However, the auxiliary services program struck down in *Meek* was challenged soon after its enactment, and the case reached this Court with a very meager record of how the program operated. Under those circumstances, the Court in *Meek* focused on the potential problems that could arise from such a program.

There is no justification for such an approach in this case which has an extensive and uncontested record of how New York City's private school Title I program has operated since its inception in 1966. That record discloses that none of the potential problems that concerned this Court in *Meek* has materialized in the New York City program. Under the circumstances, the court of appeals' application of a *per se* rule in this case led it to the wrong result.

2. One consequence of the court of appeals' application of a *per se* rule was that it disregarded totally the extensive and uncontested evidentiary record developed in this case. That action by the court of appeals is directly in conflict with this Court's decision in *Wheeler* v. *Barrera*, *supra*, 417 U.S. 402 (1974).

At issue in *Wheeler* was whether Missouri officials had breached their statutory obligation to provide to private school students Title I services comparable to those provided to public school students. The state officials contended that the only comparable services that would satisfy private school students were on-premises remedial instruction during regular school hours and that such a program in church-affiliated schools would violate the Establishment Clause. This Court rejected that invitation to rule on the constitutionality of an on-premises Title I program, noting that no such program was before it and that "the First Amendment implications [of such a program] may vary according to the precise contours of the plan that is formulated." 417 U.S. at 426.

Clearly, the Court was inviting parties litigating the constitutionality of an on-premises Title I program to develop an evidentiary record of the program at issue. The defendants in the trial court in this case did exactly as this Court suggested in *Wheeler*, only to have the court of appeals totally disregard that record by deciding the case on the basis of a *per se* rule. Appellants suggest that the court of appeals erred in ignoring the evidentiary record in this case.

The court of appeals compounded that error when, in ruminating on the possible constitutional infirmities of New York City's on-premises Title I program, it relied on hypothetical and speculative concerns that find no support in the record of this case. (S.G. App. 38a-41a). That approach is in clear conflict with this Court's decision in *Tilton* v. *Richardson*, 403 U.S. 672 (1971). There, the Court stated pointedly:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." 403 U.S. at 679 (plurality opinion).[17]

It was clear error for the court of appeals to base its constitutional ruling on hypothetical concerns that find no support in the extensive and uncontested evidentiary record in this case.

3. The court of appeals' ruling directly affects only New York City's Title I program for private school students. As such, it might appear that its ruling will have only limited impact. In fact, however, its ruling will have a nationwide impact that could jeopardize the entire Title I program.

New York City is not alone in providing Title I instructional services on the premises of church-affiliated schools. Other suits challenging the constitutionality of Title I have revealed that on-premises services for students in church-affiliated schools is probably the norm throughout the country.[18] Thus, unless reversed by this Court, the court of appeals' decision is likely to affect Title I programs throughout the country. *Cf. Flast* v. *Cohen*, 392 U.S. 83, 88-90 (1968).

---

[17] More recently, the Court has rejected reliance on hypothetical infringements of claimed First Amendment rights to override application of anti-discrimination laws. *Roberts* v. *United States Jaycees*, 52 U.S.L.W. 5076, 5081 (U.S., July 3, 1984).

[18] Evidence or discovery in cases in Missouri, Minnesota and Kentucky revealed on-premises Title I programs for students in church-affiliated schools in all three states. *Wamble* v. *Bell*, C.A. No. 77-0254-CV-W-8 (W.D. Mo., argued and submitted March 30, 1983); *Stark* v. *Bell*, No. 4-78 Civil 222 (D. Minn., voluntarily dismissed on April 13, 1984); *Barnes* v. *Bell*, C.A. No. C-80-0501-L(B) (W.D. Ky., filed October 2, 1980).

Moreover, although private school students are a small percentage of those who benefit from Title I instruction,[19] Congress has always considered the equitable participation of private school students an important feature of the Title I program.[20] For example, Congress has twice amended Title I—in 1974 [21] and 1978 [22]—to strengthen the provisions requiring participation of private school students in Title I.

The court of appeals acknowledged that the available alternatives to on-premises services for private school students will be more costly and less effective educationally. (S.G. App. 52a). It is possible that any weakening of the Title I services provided to private school students could cause Congress to reassess its long-standing commitment to Title I.

Because of these potentially broad ramifications of the court of appeals' decision and because of the pendency of other cases [23] making identical constitutional challenges

---

[19] Nationwide, more than 5 million public school students participate in Title I, as compared to almost 200,000 private school students.

[20] See generally, P. Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools*, 1 Land & Water L. Rev. 475 (1966).

[21] The Education Amendments of 1974 strengthened the provisions of Title I requiring comparable and equitable services for private school children by adding enforcement procedures that could be implemented against states failing to meet their statutory obligation to provide those comparable and equitable services. P.L. 93-380, 88 Stat. 484, 497-99 (1974).

[22] The Education Amendments of 1978 added the requirement to 20 U.S.C. § 2740 that the expenditures for educational services for educationally deprived children in private schools "shall be equal . . . to expenditures for children enrolled in the public schools of the local educational agency." P.L. 95-561, 92 Stat. 2143, 2171-72 (1978).

[23] *Wamble* v. *Bell*, C.A. No. 77-0254-CV-W-8 (W.D. Mo., argued and submitted March 30, 1983); *Barnes* v. *Bell*, C.A. No. C-80-0501-L(B) (W.D. Ky., filed October 2, 1980).

to Title I, this Court should grant plenary review in this case to dissolve the constitutional cloud that now surrounds Title I.

4. This Court has agreed to grant plenary review in the case of *School District of the City of Grand Rapids* v. *Ball*, No. 83-990, October Term, 1983 (cert. granted Feb. 27, 1984). While the program at issue in that case differs in several regards from Title I, both programs share the common feature of public school teachers providing instruction in church-affiliated schools. Because it appears that this Court is prepared to address the constitutionality of that practice in the *Grand Rapids* case, and because it was that practice that the court of appeals found constitutionally infirm in this case, this Court should give Title I the same thorough consideration it has already agreed to give the shared-time program at issue in the *Grand Rapids* case. In fact, appellants respectfully suggest that the two cases be set for argument together.

CONCLUSION

For all of these reasons, this Court should note probable jurisdiction over this appeal and resolve once and for all the constitutionality of on-premises Title I services for students attending church-affiliated schools.

Respectfully submitted,

CHARLES H. WILSON
Counsel of Record
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Counsel for Appellants

Dated: August 10, 1984

APPENDIX

83-6359

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BETTY-LOUISE FELTON, CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL A. SCHWARTZ,
ROBERT H. SIDE and ALLEN H. ZELON,
Appellants,

v.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,
and THE CHANCELLOR OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK,
Appellees,

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ
and BELINDA WILLIAMS,
Appellee-Intervenors.

On Appeal from the United States District Court
for the Eastern District of New York

NOTICE OF APPEAL

[Filed Aug. 2, 1984]

PLEASE TAKE NOTICE that appellee-intervenors Yolanda Aguilar, Lillian Colon, Miriam Martinez and Belinda Williams appeal the Judgment of this Court in

this case to the United States Supreme Court pursuant to 28 U.S.C. § 1252.

Appellee-intervenors Yolanda Aguilar, *et al.*, note that the decision of this Court in this case provides that an appeal of its decision to the Supreme Court shall operate to stay the mandate of this Court until the final disposition of the appeal by the United States Supreme Court. Slip Op. at 5108.

Respectfully submitted,

/s/ Charles H. Wilson
CHARLES H. WILSON
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

/s/ Joseph C. Markowitz
JOSEPH C. MARKOWITZ
PARKER, AUSPITZ, NEESEMANN & DELEHANTY, P.C.
415 Madison Avenue
New York, New York 10017
(212) 355-4415
Counsel for Appellee-Intervenors

CERTIFICATE OF SERVICE

I hereby certify that I have, this 2nd day of August, 1984, served a copy of this "Notice of Appeal," by first-class mail, postage prepaid, upon the following:

Stanley Geller, Esquire
Butler, Jablow & Geller
400 Madison Avenue
New York, New York 10017
Counsel for Appellants

Michael Jay Singer, Esquire
Appellate Staff
Civil Division
Department of Justice
Main Building, Room 3417
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Counsel for Appellee Secretary,
United States Department of Education

Leonard Koerner, Esquire
Chief, Appeals Division
City of New York
100 Church Street, Room 6F37
New York, New York 10007
Counsel for Appellee the Chancellor of the
Board of Education of the City of New York

/s/ Charles H. Wilson
CHARLES H. WILSON
Counsel for Appellee-Intervenors
Yolanda Aguilar, *et al.*